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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

[redacted] LTD.,
Petitioner,

[redacted] INC.,

[redacted] COUNCIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[redacted]
AND INDUSTRY
ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the court below err in holding that citizen suits may be brought under the Clean Water Act, 33 U.S.C. §1365, seeking civil penalties for past violations against defendants who are currently in full compliance with the Act?

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Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) 11, 12, 14-15, 20, 24, 27

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Legislative Materials

A Legislative History of the Water Pollution Control Amendments of 1972 (1973)
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S. Rep. No. 414, 92nd Cong., 1st Sess. at 64, 79-81, reprinted in 1972 U.S. Code Cong. & Ad. News, Vol. 2 at 3745 ..... 11, 23

Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Commission on Public Works, U.S. Senate, 92nd Congress, 1st Sess., Serial No. 92-H9 at 109, 114, 707 22-23

118 Cong. Rec. 33,693 21

Other Authorities

D.P. Jones, Activists Pressure Polluters. Hartford Courant, October 6, 1986 p. 1 46

Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administred Statutes (1984) 29, 39, 43

Lewis, Environmentalists' Authority to Sue Industry for Civil Penalties is Unconstitutional Under the Separation of Powers Dctrine, 16 Envir. L. Rep. 10101,10102 (1986) 31

J. Miller, Private Enforcement of Federal Pollution Control Laws: Part III, 14 Envt'l L. Rep (Envt'l L. Inst.) 10407, 10426 (1984)

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R. Schwartz & D.P. Hackett, Citizens Suits Against Private Industry Under the Clean Air Act, 17 Natural Resources Lawyer 327 (1984) 25-27, 41

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in the State of Connecticut, having 6300 members who employ a total workforce of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

CBIA and its members have been directly involved in the issue that is before the Court. Of the 54 Citizen Notices of Intent to sue filed in Connecticut since 1983, 42 have named CBIA members as defendants. These members have thus far paid over one million dollars in settlements, and other suits are still pending.

This Court previously granted CBIA's Motion for Leave to file a brief as amicus curiae in support of the petition for

certiorari herein. CBIA has received the written consent of all parties to file this brief, and said consents are filed herewith.

INTRODUCTION AND STATEMENT OF THE CASE

In its narrowest outlook this case concerns whether Gwaltney of Smithfield, Ltd., shall have to pay $1.3 million into the United States Treasury as a civil penalty on a suit brought by private plaintiffs, despite having already achieved full compliance with its permit requirement prior to the institution of this action.

But to an extent considerably beyond that of the usual case, this matter also involves issues which will have a significant continuing effect on a multitude of persons, business enterprises, and regulatory agencies throughout the nation. The citizen suit

provision at issue herein appears not only in the Clean Water Act, 33 U.S.C. §1365, but in relevant part also in two other major federal environmental statutes, RCRA and the "Superfund" statute, CERCLA. Under the Clean Water Act itself there are roughly 65,000 NPDES permits, the holders of which, even if presently in full compliance, may still be vulnerable to citizen suits under the interpretation suggested by the plaintiffs, Chesapeake Bay Foundation and Natural Resources Defense Council.

The plaintiffs' reading of the statute has already generated a substantial increase in citizen suit litigation under the Clean Water Act alone. The provision had been used sparingly prior to late 1982, an average of five times a year, but has since seen over 640 Notices of Intent to sue under §1365(a)(1).

The broader application of this case

will have major implications for a great number of environmental permittees and potential citizen organizations. Its implications differ significantly, however, from what CBF and NRDC argue. The outcome of this case will have no noticeable effect on compliance under these environmental statutes, as compliance is not at issue. Gwaltney was fully in compliance at the time suit was brought. In fact, unlike the wide open jurisdictional rule proposed by plaintiffs, a more moderate rule -- permitting citizen suit penalties for past violations only as to those parameters[1] for which a discharger is currently in violation (a variation on the rule adopted by the First Circuit) -- would create an

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1. NPDES permits are drawn in terms of the designated pollutants, or parameters, included in the discharge stream, and set separate and independent limitations for each parameter. 33 U.S.C. §1342(a), 40 C.F.R. §122.

even greater incentive to compliance.

What is at issue in this case is not compliance, then, but a question of the proper role of "citizen enforcers" under the statutory scheme, and whether they may be allowed, on the basis of this public right of action, in various respects to realize private benefits from a discharger's past non-compliance.

The enforcement provisions of the Act follow two tracks -- the prospective track, intended to abate current pollution and to ensure, by injunctive relief and the threat of penalties, its continued future control; and the retrospective, intended to apply civil penalties as a punitive measure for past violations. That a citizen plaintiff is authorized to exercise the prospective enforcement power

is clear. But to grant to citizen plaintiffs -- with their varied environmental priorities, their differing technical capabilities, and the dangerous potential for self-interest in the outcome -- authority to exercise the punitive aspect of the statute, is both improper under the Act and unwise public policy.

Congress quite clearly intended the role of these "citizen enforcers" to be one of providing a secondary line of defense, to protect the public environmental interest against present and prospective harm when the agency has failed to do so. Instead, plaintiff organizations have become little more than bounty hunters, using the statute's punitive measures and the federal courts as a means of advancing principally their own private interests.

The private interests of the plaintiff organizations are very clearly served by

these suits. The threat of penalties for past violations has allowed plaintiff organizations a significant measure of unjust enrichment, by "contributions" in lieu of civil penalties, and by substantial attorneys fees.

Citizen plaintiffs were never intended to possess the same enforcement powers under the Act as does the Administrator. While a plaintiff organization may surely use the Act as shield -- in prospective fashion to help in the protection of the public environmental interest -- its use as sword must properly be reserved to the Administrator, whose choice of punitive sanctions, their subject and their extent, may not be colored by a private interest in the outcome.

SUMMARY OF ARGUMENT

The Clean Water Act is so structured as to create a two-tiered enforcement authority. Primary enforcement authority is vested in the Administrator and the states. Citizen suits are intended only to provide supplementary and limited enforcement. The language of the citizen suits provision specifically limits jurisdiction to instances of present violations. The legislative history makes clear that Congress intended that citizen plaintiffs be authorized to enforce the Act only in prospective fashion, to abate present violations and employ the civil penalty sanction to ensure that compliance is achieved and maintained.

Congress also plainly intended to enact a citizen suit provision whose use would be restricted by the absence of any incentive to sue other than the protection

of the public health and welfare. There has, over the past four years, been a sudden and dramatic increase in citizen suits under the Act. The increase is the product not of any change in the statute, but of a judicial interpretation of the citizen suit provision to permit suit for civil penalties for past violations, in the absence of any current violation. The pattern and practice of these cases indicate that the opportunity for private gain to plaintiff organizations is their principal motivating factor. Such practice contravenes the manner in which Congress intended the citizen suit provision to be read.

The citizen suit provision must be interpreted to require a current violation in order to support jurisdiction. The "good-faith allegation" rule is based upon an analogy which is inappropriate. The proper interpretation is that a citizen

plaintiff may bring suit against any person who is in fact in violation of the statute at the time suit is file. Civil penalties, including penalties as to past violations of any parameter for which the defendant is currently in violation, would be among the available enforcement tools.

ARGUMENT

I. THE CLEAN WATER ACT CREATES A STATUTORY SCHEME WHICH LIMITS CITIZEN SUITS TO ABATEMENT OF PRESENT VIOLATIONS.

A. The Structure of the Act Gives Primary Enforcement Authority to the Government.

"Primary enforcement responsiblity under the Act lies with the states and the Administrator" of EPA. Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (5th Cir. 1985). Citizen suits are intended to play only a supplemental, secondary role.

The Act assigns the Administrator and the states to the front line of the enforcement effort. As the Senate Report on the Clean Water Act noted, "The Committee intends the great volume of enforcement actions to be brought by the State." S. Rep. 414, 92d Cong, 1st Sess. at 64, reprinted in 2 A Legislative History of the Water Pollution Control Amendments of 1972 at 1482 (1972) (hereinafter "Leg. Hist."). "States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. §402(b)(7), 33 USC §1342(b)(7)." Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981).

The statute gives the Administrator even greater authority, both to enforce

the Act and to supervise state enforcement. EPA may issue compliance orders to violators, 33 U.S.C. §1319(a) (1977), and may sue for "appropriate relief," including injunctions and civil penalties. §1319(b). The Attorney General or U.S. Attorney may criminally prosecute violators. Under the recent amendments to the Act, EPA can exact administrative penalties of up to $25,000 per day. Water Quality Act of 1987, Pub. L. 100-4,, 101 Stat. 7, §314 (1987).

This elaborate enforcement structure is "supplemented" by citizen suits of a "limited nature." Middlesex County, 453 U.S. at 14, 17 n. 27. The supplementary and secondary role of citizen suits is demonstrated by the terms of the Act. At least 60 days prior to the filing of a citizen suit, the EPA, the state, and the alleged violator must be notified. A citizen suit is barred by the prior filing

of a complaint by the Administrator or by a state. 33 U.S.C. §1365(b). Citizens are permitted to sue only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility . . . ." 2 Leg. Hist. 1482.

B. The Statutory Language Creates Citizen Suit Jurisdiction Only As To Current Violations.

1. On Its Face the Statute Requires a Showing of Present Violation.

The Clean Water Act provides for federal jurisdiction over citizen suits against a private party "alleged to be in violation" of an effluent standard or limitation. 33 U.S.C. §1365(a)(1). This jurisdictional requirement is stated in the present tense.

The Fifth Circuit Court of Appeals has provided the clearest ruling on the issue, in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (1985):

> By its ordinary meaning, the language of §1365 requires an allegation of an ongoing violation . . . . Hamker asserts that "to be in violation of" means "to have violated"; however this interpretation obviously strains the grammar of the statute and diverges from its ordinary meaning. "[Section 1365] does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past. . . ." City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. den., 444 U.S. 1025 (1980) (cited with approval in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, [18, n.28] (1981).

Where the language of a statute is plain on its face, the courts must apply that language, and not re-fashion the wording according to their own perception of what Congress meant to say. Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

The Hamker position is supported by decisions of this Court in Middlesex County and of the Seventh Circuit in City of Evansville, supra. Both cases presented claims for damages pursuant to

an implied private right of action under the Clean Water Act. The analysis necessarily demanded an examination of the nature and adequacy of the remedies which the Act expressly does provide. Both courts noted the statute's explicit limitations on citizen suits. The citizen suits provision "allows suits under the Act by private citizens, but authorizes only prospective relief," Middlesex County, 453 U.S. at 6 (emphasis supplied); and permits private citizens "to sue for injunctions to enforce" the statute. Id. at 14. The structure of the Act and its legislative history underscore "the limited nature of the citizen suits being authorized." Id. at 17, n. 27. Accord, City of Evansville, 604 F.2d at 1014.

The conclusion of the Court below in the instant case, that the language of the Act can be construed to permit suits for purely past violations, has also

recently been rejected by the First Circuit Court of Appeals. The Court below reasoned that a defendant "continues to be 'in violation' by having 'violated,'" analogizing the case to that of a taxpayer who underpaid in only one year. 791 F.2d 304 at 309. The analogy, however, fails.

> [I]n the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1092 (1st Cir. 1986). The First Circuit concluded that the Act unambiguously restricts citizen suits to present violations, "particularly when it would have been so easy for Congress to have said 'has violated,' instead of 'is in violation' if the former was its intention, and with the difference being so conspicuous." Id.

Moreover, the 60-day notice requirement also implies that the alleged violator may avoid suit by achieving compliance. As the Hamker Court noted,

> §[I]t is most reasonable to read the requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under §1365(a), just as he loses the right to commence an action where the Administrator or the state responds by diligently prosecuting an action against the alleged violator.

756 F.2d at 396.

2. Jurisdiction Under the Citizen Suit Provision is Not Analogous to Jurisdiction Over Governmental Enforcement Actions.

The Court below accepted the argument that the Clean Water Act draws no relevant distinction between citizen suits and government suits invoking federal court jurisdiction against violations. Since the United States can surely sue for

penalties for purely past violations under 33 U.S.C. §1319(b), the argument goes, citizens must also have the same authority under §1365. 791 F.2d at 309-310.

The Administrator's authority to sue for civil penalties for past violations is not, however, entirely clear, at least under the explicit terms of §1319. The Act provides only for jurisdiction over suits by the Administrator "for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order...." 33 U.S.C. §1319(b). Throughout §1319 the language is explicitly drawn in terms of prospective relief.

But the Administrator may appropriately be deemed to hold <u>implicit</u> enforcement authority under the Act as well, and it is in this important regard that the direct comparison between his

power and that of citizen plaintiffs breaks down. As the primary enforcer of the Act, the Administrator may be held to possess whatever reasonably implied enforcement authority is necessary to achieve the statutory goals. That authority has been held to be broadly construed to effectuate the purposes of the Act. Environmental Defense Fund v. Costle, 657 F. 2d 275 (D.C. Cir. 1981) (holding that any ambiguities as to the Administrator's enforcement powers are to be resolved in his favor). When the federal government sues to enforce the Act with civil penalties, the suit is "commenced by the United States," see, e.g., U.S. v. Earth Sciences,Inc., 599 F.2d 368 (10th Cir. 1979).Federal jurisdiction lies not under §1319 of the Clean Water Act, but under 28 U.S.C. §1345 which grants jurisdiction over cases commenced by the U.S.

No such implied right of action exists, however, for citizen plaintiffs, whose enforcement role is plainly limited and secondary under the Act. This Court has previously held that, "the remedial devices provided in" the Clean Water Act "are sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under Sec. 1983." Middlesex County, 453 U.S. 1, 20 (reversing National Sea Clammers Association v. New York, 612 F.2d 1222 (3d Cir. 1980), which had held that the district courts have federal question jurisdiction under 28 U.S.C. §1331 over citizen suits). Given the carefully crafted special jurisdictional grant of the citizen suits provision in the Clean Water Act, this Court held there to be no extra-statutory right of action on the

part of citizen plaintiffs, analogous to the Administrator's implicit and broad enforcement authority.

The statute itself seems to support this result, as it impliedly recognizes the Administration's authority to render post hoc "findings" of violation, an authority not reflected in the citizen suit provision. 33 U.S.C. §1319(a)(1); and see, Senate Consideration of the Report of the Conference Committee, October 4, 1972, reprinted in 1 Leg. Hist, at 174 (1973) (Administrator's duty to determine whether a violation "has occurred"); 118 Cong. Rec. 33,693.

3. The Legislative History Demonstrates Congress's Intent to Limit Citizen Suits to Abatement of Current Violations.

Congress intended in the Clean Water Act to write a statute whose meaning would

be clear on its face. "[W]e have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." Remarks of Sen. Muskie during Senate debate, 1 Leg. Hist., Vol 1 at 163-164 (1973).

While the statutory language speaks clearly, the legislative history further underscores Congress's intent to authorize citizen suits only to "abate" ongoing violations of the Act. The purpose of the citizen suits provision was described as permitting citizens to "seek compliance . . . with the Act," Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, 92d Congress, 1st Sess.,

Serial No. 92-H9 at 109; "to abate a violation," id. at 114; and to sue "for the purpose of abating pollution," Id. at 707 (comment of Sen. Eagleton). Accord, S. Rep. 414, 92d Cong., 1st Sess. at 79-81, reprinted in 1972 U.S. Code Cong. & Ad. News, vol. 2 at 3745 ("USCCAN") and in 2 Leg Hist. at 1482, 1497; 1 Leg. Hist. at 220-221. "Abate" means "to put an end to." Webster's New World Dictionary, p. 2 (1976).

4. The Legislative History Demonstrates That Congress Intended Not To Create a Private Incentive to Sue.

The legislative history also demonstrates that Congress intended to avoid creating a citizen suits provision which might be used as a source of private gain. Civil penalties payable under the Act -- $10,000 per day of violation, recently amended to $25,000 -- are

required to be paid to the U.S. Treasury, rather than to a private plaintiff. 1 Leg. Hist. at 674. Report of the Senate Public Works Comm. at 79, 2 Leg. Hist. at 1497. "[A] citizen can obtain an injunction but cannot obtain money damages for himself." 1 Leg. Hist. at 220-21 (comment of Sen. Bayh); see also, Middlesex County, 453 U.S. 1, 11.

Permitting citizen suits for past violations would defeat this Congressional intent:

> If §1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court.

Hamker 756 F.2d at 396. The Fifth Circuit was concerned with the threat of pendent state damage claims, but the same

principle applies in the present case. Plaintiff organizations have used suits for past violations to obtain substantial settlement payments and attorneys fees. This is precisely the sort of private incentive to sue that Congress meant not to create.

The first citizen suits provision was in the Clean Air Act of 1970. It was the model for the Water Act version. It was also the subject of extensive debate over fears that it would be abused to clog an already congested federal court system. R. Schwartz & D. Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Nat. Res. Lawyer 327 at 328 (1984). Some Congressmen expressed concern about frivolous or harassing suits, duplicative litigation, EPA enforcement decisions being overridden by citizen suits, and inconsistencies in enforcement policy. Id. at 328-29. In

response Senator Hart pointed out that the inability of plaintiffs to collect damages would limit the number of suits filed. Id.

The addition in the Clean Water Act of the provision empowering the Courts to assess "any appropriate civil penalties" was not discussed in the legislative history, Schwartz & Hackett at 331, except to specify that any such penalties be paid into the federal Treasury. Congress considered and specifically rejected the option of allowing citizens to collect part of the penalties. 1 Leg. Hist. at 220-21 (comment of Sen. Bayh); and see, Report of the Senate Public Works Comm. at 79, reprinted in 2 Leg. Hist. at 1497.

This Court has recognized, as has the Fifth Circuit in Hamker, that "one of the primary congressional purposes behind limiting citizen suits was to preclude the possibility that §1365 suits would place

an undue burden on the federal courts."

Hamker, 756 F.2d at 396.

> [T]he legislative history of the [Clean Air] Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for. Senator Hart, for example, stated:
> "It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of §1358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill." 116 Cong. Rec. 33104 (1970).

Middlesex, 453 U.S. at 17, n. 27 (emphasis supplied). It was this measure, incorporated in the Clean Water Act, which Senator Muskie recognized as a "restrictive" citizen suits provision. Schwartz & Hackett, at 330. See also,

Hamker, 756 F.2d at 396 (availability of citizen suit for civil penalties for past violations, because Act allows for attorneys fee awards and expenses, would undermine congressional intent to limit actions to those brought solely to protect health and welfare).

II. THE CURRENT PATTERN OF USE OF CITIZEN SUITS DEMONSTRATES THAT THE BROAD JURISDICTIONAL READING PROPOSED BY THE PLAINTIFFS IS AT VARIANCE WITH THE INTENT OF CONGRESS.

The experience of the federal courts since 1983 underscores that the expansive reading of the statute adopted by the Fourth Circuit and other courts has generated an enormous increase in citizen suit litigation. Such litigation is motivated by the likelihood of substantial windfall financial benefits to plaintiff organizations, both from the pattern of out-of-court settlements which has developed, and from the availability of attorneys fees.

A. There Has Recently Been a Prolific Increase In Citizen Suits Under The Act, Largely As a Result of The Statutory Interpretation Which Is At Issue Herein.

For the first ten years, from its enactment in 1972 the citizen suits provision of the Clean Water Act was rarely used. During the four years from 1978 through 1981, for example, on average fewer than five such suits per year were filed nationwide. Env'l L. Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes ("ELI Study") III-10, 27, 29.

Beginning on September 17, 1982, with the filing of a group of 15 by one law office (variously on behalf of Sierra Club, NRDC, NJPIRG, and Friends of the Earth) the number of suits has increased dramatically. EPA, is entitled by law to receive a copy of each Notice of Intent to sue, 33 U.S.C. §1365(b)(1)(A);

but from the experience of the amicus, its records are incomplete. They do, however, reveal that in the past four years at a minimum 640 Notices have been filed. See Table, Appendix A, attached hereto.

It is uncertain precisely what percentage of these notices have subsequently been followed by litigation, as there has been, prior to the 1987 Clean Water Act Amendments, no requirement that EPA be notified of the filing of a Complaint. It is known, however, that at least 140 have resulted in federal court Complaints. And if Connecticut is any guide, the numbers are likely to be even higher. Of 54 Notices of Intent filed in Connecticut from 1983 to date, 37 (69%) have so far led to federal court

litigation.[2]

The citizen suit Notices have been broadly distributed geographically, with each of the ten EPA Regions and at least 38 states and the District of Columbia represented. See Table, Appendix B.

The cause of this sudden and dramatic increase in citizen suit litigation is apparent from its subsequent pattern and practice. The majority of these cases have been filed by a small group of plaintiff organizations, for which the suits have become a substantial revenue-raising device. Most of the Notices filed since September of 1982 -- 379 of the 648 Notices, or 59% - have been filed by or on behalf of only six

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2. By another account, of the 108 citizen suit notices filed in 1983 alone, 62 led to federal court suits, which together requested approximately $100 million in penalties. Lewis, "Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Powers Doctrine," 16 Envir. Law Rep. 10101, 10102 (1986).

organizations: Natural Resources Defense Council, Sierra Club, Friends of the Earth, Atlantic States Legal Foundation, Connecticut Fund for the Environment, and New Jersey Student Public Interest Research Group. See Table, Appendix A.

There is, of course, nothing per se improper in so large a share of this litigation and threatened litigation being carried on by so limited a cast of plaintiffs. But the extent of the plaintiffs' practice in this area, and the pattern which it follows, are largely the product of a judicial interpretation of the citizen suit provision to permit jurisdiction for civil penalties for past violations. The result -- one of vastly increased litigation, motivated by the opportunity for substantial private gain -- is at great variance from the limited

secondary enforcement authority for citizens which Congress intended to provide.[3]

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3. The precedent to be established herein will have impact even beyond the 65,000 NPDES permits issued under the Clean Water Act. Citizen suit provisions in relevant respects identical to that found in the Clean Water Act have also been included in the Resource Conservation and Recovery Act, (RCRA) 42 U.S.C. §6972 (1984) (penalties of up to $25,000 per day of violation), and in the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499, 206, adding new §310 to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601, et seq. (1980), (penalties of up to $25,000 per day of violation for a first offense, and up to $75,000 per day for subsequent offenses).

B. Penalty Claims for Past Violations Are A Significant Factor In The Increased Number of Citizen Suits.

There is little question that jurisdiction over past violations -- whether in the absence of, or in conjunction with, present violations -- is a major element of the great majority of citizen suit Notices and litigation.

Due to the difficulty of obtaining complete information, it is impossible to state a precise total of those citizen suit claims which relate, as in the instant case, to purely past violations. Several relevant points can be made, however, from the available information.

More than 20 claims based on purely past violations have thus far reached the stage of reported decisions. Petition for Writ of Certiorari at 22, n.15. The numbers of those brought and unreported, settled, or still pending are likely to be considerably higher.

A review of the EPA files reveals that a significant number of Notices relate to purely past violations. Furthermore, a vast majority of the claims of violation made in virtually every Notice relate to permit parameters for which the defendant is in full compliance at the time the notice is filed.

Discharge Monitoring Reports, which are the source documents for the Notices, must be filed monthly with EPA. The time lag between the filing of a DMR and its availability to the public through EPA is commonly about one month. Chesapeake Bay Foundation and Natural Resources Defense Council v. Gwaltney of Smithfield, Ltd., 611 F.Supp. 1542, 1549 (E.D. Va. 1985). Even allowing, for the sake of argument, up to four months as a lag time by which to distinguish claims of current

violations from past violations, it is apparent that a significant proportion of the Notices concern purely past violations. Of the 353 Notices received from EPA which set forth the dates of violations, 281, or 80%, fail to allege any violations within three months prior to the date of Notice.

Among the remaining 72 Notices, even when a claim of an arguably "current" (within four months) violation is included in a Notice, on average 75% of the violations alleged are still for past violations on parameters for which the defendant is, at the time of the Notice, in full compliance. See Table, Appendix C.

That this litigation drive is generated by the jurisdictional finding at issue herein may also be inferred from an examination of the courts in which these cases have been filed. Of the 377 Notices

filed by the six active environmental groups since 1982, 234 (62%) have been filed in jurisdictions which have held that such suits can be brought for civil penalties for purely past violations. Only 39 have been filed in jurisdictions which have rejected this theory, and of those, all but two were filed in Texas or Louisiana prior to the decision in Hamker. No suits have been filed by the above environmental groups in the Fifth Circuit since Hamker or in the First Circuit since Pawtuxet Cove. If present violations were a more significant motivating factor, one would expect a more evenly distributed pattern of filings.

C. Citizen Suits For Civil Penalties For Past Violations Are Used For Substantial Private Gain.

Far from displaying the public environmental concern which Congress had intended would be the only incentive for such suits, the current pattern and

practice of those groups primarily responsible for the upsurge in Clean Water Act citizen suits instead appear to demonstrate a far more privately-interested motivation. The availability of steep civil penalties for what is an easily proved strict liability offense, in addition to an award of attorneys fees, almost invariably induces an out-of-court settlement on terms extremely advantageous to the plaintiff organizations. It is the judicial extension of citizen suit jurisdiction to past violations which has made this practice so lucrative, as there is nothing that defendants, having already achieved compliance, can do to cut off plaintiff's right of action.

The prosecution of a citizen suit for a past violation is relatively simple and straightforward. Holders of NPDES permits under the Act are required to monitor their effluent discharges and to file monthly Discharge Monitoring Reports. 33

U.S.C. 1318(a)(3)(A); 40 C.F.R. 122.41(l)(4). These DMRs are public records, and are typically the source documents for claims of violation. ELI Study at I-7, V-2, V-12. Courts have generally ruled that the DMRs constitute admissions, and some have held that they provide conclusive evidence of violation of the statute's strict liability standard. Student Public Interest Research Group of New Jersey v. Jersey Central Power Co., 642 F.Supp. 103 (D.N.J. 1986).

The courts which have allowed suit for past violations have generally borrowed a five-year statute of limitations.[4]

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4. While occasional courts have held there to be no statute of limitations for such actions, and have therefore permitted plaintiffs to go back indefinitely, Student Public Interest Research Group of New Jersey v. Tenneco Polymers, 602 F.Supp. 1394 (D.N.J. 1985); the more usual rule is to imply the general federal penalty statute of limitations of five years. 28 U.S.C. 2462. Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y. 1986), and cases cited.

The statute, as recently amended, sets a civil penalty of "$25,000 per day for each violation," 33 U.S.C. 1319(d), and some courts, including the Court below in the instant matter, have interpreted that provision to permit an assessment of up to thirty times the daily maximum for violation of a single monthly average limitation (i.e., $750,000). 791 F.2d at 313-15. Given the severity of the potential penalty, plus attorneys fees and costs to the plaintiff, and given the unavailability of virtually all legal defenses, a defendant whose DMRs display even the slightest violation during the previous five years is likely to be disposed to settlement.

The settlement terms proferred by the plaintiff organizations provide further demonstration that the current tactic diverges significantly from Congress's

intended result.

> As a starting point, the environmental groups frequently inform target companies that their settlement goals include entry of a consent decree containing the following provisions:
> 1. civil penalties or alternatively, a contribution of a comparable amount to an environmental project located in the same state,. . . . .
> 4. reimbursement for the plaintiffs' attorney's fees and litigation costs.

Schwartz & Hackett at 328 (1984). See J. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Envtl. L. Rep.(Envtl. L. Inst.) 10407, 10426 (1984).

Consent decrees in citizen suits brought by environmental groups have typically included payments of up to $1,500,000 as "contributions" to environmental organizations in lieu of

civil penalties to the U.S. Treasury.[5] The agreement may also provide for a schedule of penalties in the event that the defendant violates the consent decree. In some instances, the plaintiffs themselves, or closely related organizations, have been the beneficiaries

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5. E.g., Chesapeake Bay Foundation & Natural Resources Defense Council v. Bethlehem Steel Corp., No. Y-84-1620 (D.Md Feb. 16, 1987) ($1,500,000 to unspecified environmental organizations in the Chesapeake Bay area, plus $500,000 to CBF and NRDC for "costs and fees"); Sierra Club v. Keystone Automotive Plating Co., No. HM 84-4020 (D.Md. May 30, 1986) ($400,000 to the Nature Conservancy); Student Public Interest Research Group of New Jersey v. Ragen Precision Industries, No. 83-1604 (D.N.J. Nov. 16, 1985) ($100,000 to the Passaic River Coalition); Sierra Club v. Aluminum Company of America, 585 F.Supp. 842 (N.D.N.Y. 1984) (consent decree Oct. 5, 1984) ($87,400 to the Adirondack Historical Association).

of these payments. See Table, Appendix D.[6]

In addition, the consent agreements usually provide for substantial attorneys fees and other litigation charges to be paid to the plaintiff organizations. Such fees sometimes exceed the amount of the

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6. E.g., Sierra Club and Natural Resources Defense Council v. Interpace Corp., No. 83-0127C (W.D.N.Y., Feb. 14, 1983) ($25,000 for environmental projects selected by plaintiffs); Sierra Club v. Philips ECG, No. 83-52T (W.D.N.Y. Jan. 25, 1983) ($15,000 to be used by Sierra Club for projects of its choice relating to Seneca River); Connecticut Fund for the Environment and Natural Resources Defense Council v. Bridgeport Brass Company, No. H-84-955 (D.Conn. Oct. 23, 1984) ($30,000 in an unrestricted contribution, plus up to $86,000 more in noncompliance penalties, to the Open Space Institute, an organization with the same address as the NRDC, and some of whose principals are the same as those of NRDC. ELI Study at IV-15).

penalty or "contribution."[7]

A comprehensive nationwide picture of the pattern of citizen suits and their settlement is difficult to provide. But a view of those notices filed in Connecticut is at least instructive, and may be representative of the nationwide practice.

The sudden upsurge of citizen suit activity in Connecticut began in September, 1983, with the filing of 21 Notices of Intent to sue. The Notices were filed jointly by the Connecticut Fund for the Environment ("CFE") and the

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7. E.g., Student Public Interest Research Group of New Jersey and Natural Resources Defense Council v. J.T. Baker Chemical Co., No. 83-685, (D.N.J., Jan. 19, 1984) ($10,000 civil penalty payable to U.S. Treasury and $29,000 in attorneys fees and other costs payable to plaintiffs); Hudson River Sloop Clearwater and Natural Resources Defense Council v. White Mop Wringer Co., No. 82-CV-1306 (N.D.N.Y., June 12, 1984) ($15,000 to Open Space Institute and up to $23,000 attorneys fees and other litigation expenses).

Natural Resources Defense Council ("NRDC"), and, except for the recitation of the particulars of the discharges, locations, and dates which allegedly violated the Act, the format and language of each notice is identical.

From 1983 through the present date, 54 notices are known to have been filed in Connecticut, 47 of which have been filed by CFE and NRDC. Of those 47 Notices filed, two have gone to judgment on the merits.[8] Three are still pending. The remaining 42 have been settled, 8 prior to the filing of a Complaint and the other 34 after suit had been instituted.

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8. CFE and NRDC v. Job Plating Co., 623 F.Supp. 207 (1985), Motion for Summary Judgment decided in favor of plaintiffs on Sept. 27, 1985, on basis that jurisdiction is available for civil penalties for purely past violations, settled for $77,500 after Court referred parties to Gwaltney lower court ruling for plaintiffs; CFE and NRDC v. Contract Plating Co., 631 F.Supp. 1291 (1986), citizen suit barred by State's diligent prosecution of prior suit.

According to a recent newspaper accounting, the settlements of the 28 litigation cases in Connecticut have netted at least $916,500 in environmental contributions in lieu of penalties, and an additional $484,250 in attorneys fees to the plaintiff organizations.[9] See Table, Appendix F. Figures for the 10 matters settled prior to suit are not known.

The private interests of the plaintiff organizations are very much at stake in this practice. Settlements have called for substantial "contributions" in lieu of penalties to the U.S. Treasury, a

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9. D.P. Jones, "Activists Pressure Polluters", Hartford Courant, October 6, 1986, p. 1, quoting counsel for CFE.

practice the Government finds objectionable.[10] And for those litigating environmental organizations with attorneys on staff, the significant attorneys fees usually included in these settlements, based not upon a salary rate but upon prevailing hourly rates, SPIRG v. AT&T Bell Laboratories, 24 Env. Rep. Cas.

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10. In an amicus brief filed in Student Public Interest Research Group of New Jersey v. Monsanto, 600 F.Supp. 1474 (D.N.J. 1985), the United States argued that an environmental plaintiff which settled a citizen suit for a payment to itself could be considered in violation of the Miscellaneous Fees Act, 31 U.S.C. §3302(c), which requires "[a] person having custody or possession of public money" to deposit it in the Treasury. Brief, at n. 31.

Even if the recent provision of the 1987 amendments, requiring notice to the Attorney General of any proposed consent judgment, P.L. 100-4, s. 504, (1987), serves to interrupt this practice as to cases filed in court, it will have no effect on those cases which are settled prior to the actual filing of a Complaint.

1986), (D. N.J. 1986) is an additional private benefit.[11]

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11. There is another very real, if by itself unobjectionable, private organizational interest also rewarded. The mere fact of bringing the litigation becomes a promotional tool by which to increase the organization's membership. The point is not that such practice is in any respect wrong, only that it creates a further "private benefit" incentive to such litigation, a result Congress did not intend.

D. Such Use of Citizen Suits Interferes With The Statutory Scheme.

The enforcement powers of the EPA and its delegated state agencies granted by the Act include both injunctive relief and penalty provisions. The ultimate goal of the statute is to eliminate the discharge of pollutants. 33 U.S.C §1251(a)(1). The NPDES permitting system regulates discharges to achieve interim water quality goals.

In carrying out its responsibility to achieve the statutory goals, a regulatory authority must have the discretion to choose to forego the imposition of a penalty as a means, whether informally by discussion or more formally by consent order, to persuade a more immediate, comprehensive, or far-reaching corrective measure. To allow private citizen groups to pursue an enforcement

option which the agency, in the exercise of its responsibility to achieve compliance, may have agreed to waive, is both impermissible under the Act and unsound public policy. It interferes with the agency's flexibility to negotiate solutions beyond bare compliance, and it creates a severe burden on the federal courts by leaving litigation as the only means to resolve a violation with finality.

The threat of penalties for any current violation, enforceable by the agency or by any citizen, is sufficient incentive to achieve minimal compliance. But it is the agency's power to seek penalties for past violations, or to waive that right, which enables it to influence settlements providing, as in the instant case, for new state-of-the-art treatment systems which go beyond the bare minimum of compliance with the permit terms.

The court below found some significance in the argument that authorizing citizen suits for past violations would have a beneficial deterrent effect on other violators. 791 F.2d at 309-10. In fact, however, it is likely to have somewhat the reverse effect, by reducing the incentive to comply.

If citizen suits are limited to current violations, a discharger has a stronger incentive to achieve compliance quickly. Compliance would cut off a citizen right of action, and would avoid penalties for both past and future violations, rather than only for future violations. Limiting citizen suits to ongoing violations provides the greater marginal deterrence, and thus the greater incentive to compliance.

III. UNDER THE CORRECT JURISDICTIONAL RULE, A CITIZEN SUIT IS AVAILABLE ONLY IF THE ACT IS IN FACT VIOLATED AT THE TIME SUIT IS FILED.

A. The Jurisdictional Test Should Reflect the Factual Standard For Injunctive Relief.

Of major concern to the courts below has been that if citizen suits are restricted to abatement of present violations they may be excessively limited "as a tool of enforcement and deterrence." 791 F.2d at 313. An intermittent, or "chronic episodic" violator, whether deliberate or not, may evade the Act's enforcement provisions. Gwaltney, 611 F.Supp. 1542, at 1548. Because the courts below could see no clear standard by which to distinguish between an intermittent violator and an ex-violator, they rejected the rule adopted in Hamker.

However, the problem of the deceptive or "chronic episodic" violator was more properly addressed in Judge Williams's concurrence in Hamker:

> . . . [T]he requirement that the polluter be "in violation" clearly is broad enough to cover the chronic episodic violator or the violator who intentionally "turns off the spigot" just before a citizen brings suit. In either of these circumstances, the statute should surely be interpreted to cover such violations as being current. 756 F.2d at 399.

The First Circuit in Pawtuxet Cove has provided a further refinement that strengthens the argument for the Hamker rule, by offering a standard to determine which violations are "current":

> If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction.
>
> . . . In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against

future violations.

Pawtuxet Cove, 807 F.2d at 1094.

The legislative history supports the application of parallel standards for jurisdiction and for injunctive relief in such suits because they are designed for the same purpose. As the First Circuit itself said in Pawtuxet Cove:

> The Clean Air Act, from which the Clean Water Act took the phrase "is . . .in violation," see 42 U.S.C. §7604(a), provided for injunctive relief only. . . . [E]ven when in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act. . . . [P]ast permit violations are relevant to the extent that they cast light on the propriety of an injunction, no longer appropriate if there is no longer a permit.

Pawtuxet Cove at 807 F.2d at 1092-1093, (emphasis supplied).

The standard proposed, then, is that the citizen suit provision be "construed to comport with the injunctive purpose of

the Act --[to provide for federal court jurisdiction over] conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." Id.[12]

The availability of "any appropriate" civil penalties leads to no different rule in the application of the Act's enforcement provisions. Once jurisdiction obtains, by a "current violation" under the injunctive standard stated above, then civil penalties may be found an "appropriate" enforcement tool. As part of a history of recalcitrance, for

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12. There may be cases in which the pollution ceases between the time suit is filed and the time of the injunction hearing. In such a case the court would have jurisdiction, and would consider the facts at both times, and may impose penalties without granting an injunction.

example, past violations may be a valid consideration in determining the propriety of injunctive relief and/or a civil penalty.

The NPDES regulations under the Act, however, and the permits assigned thereunder, treat each permit parameter as a separate discharge limitation. 33 U.S.C. §1319(d), 40 C.F.R. §122. The limit for each pollutant is distinct, and violation of one need not in any way implicate the discharge level of another. Consistent with this approach, and with the proper role of citizen enforcers under the Act, the citizen suit jurisdictional standard should be applied on a "per parameter" basis. Jurisdiction over a continuing violation of one parameter offers no justification for jurisdiction

over an entirely unrelated parameter for which the permittee is in full compliance.[13]

Thus, the First Circuit has stated a clear and workable standard for determining whether a violation is "continuing", for purposes of establishing citizen suit jurisdiction.

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13. The 1987 Clean Water Act Amendments lend further support to this approach, by revising the penalty rule to read "$25,000 per day for each violation." The new language would appear to treat violations distinctly on a "per parameter" basis.

B. The Jurisdictional Test Should Be The Actual Fact of a Continuing Violation, and Not One of Merely Good Faith Pleading.

Having presented a clear factual jurisdictional standard, the Pawtuxet Court proceeded, without rationale other than an inapt analogy, to hold that the test by which the standard is measured is one of "good faith pleading." Such a result would seriously undermine the factual injunction standard, and serves no practical purpose.

The First Circuit made this shift for two reasons. First, it wished to avoid having jurisdiction turn on proof that a violation was "occurring at the instant of

suit." 807 F.2d at 1093. Second, to avoid this it seized on the word "alleged" in §1365(a)(1) to suggest that there need not be an actual violation at the time suit is filed so long as one is merely alleged. The Court analogized the citizen suit provision to the amount in controversy requirement in diversity cases. 807 F.2d at 1093.

The analogy, however, is both unnecessary and inapt. It is unnecessary because the First Circuit's own analysis of "continuing" violations as those for which injunctions are appropriate solves the problem. Jurisdiction need not depend on proof that there is an illegal discharge at the very instant of suit. A reasonable likelihood of a current or future violation, based upon the same objective factual standard as for injunctive relief, will be sufficient.

And the analogy itself fails because

the rationale for the amount in controversy rule is entirely different from the rationale for limiting citizen suits to present violations.

A more appropriate analogy -- to diversity or to federal question jurisdiction, for instance -- would lead to a different result. Generally, questions of federal jurisdiction are questions of fact, not merely of pleading. Federal courts are courts of limited jurisdiction; if at any point it becomes clear that a fact essential to jurisdiction is absent, the suit must be dismissed. American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). And see, Land v. Dollar, 330 U.S. 731, 735 (1947) (plaintiff has the burden of proving jurisdictional facts by a preponderance of the evidence); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 184 (1936) (trial court not bound by pleadings, but

may inquire into jurisdictional facts).

Moreover, even the "jurisdictional amount" requirement is no exception to the general rule that questions of jurisdiction are questions of fact. "Good faith" is measured objectively, as a question of fact. "[T]he appropriate legal test of plaintiff's good faith is not his subjective state of mind but a very strict objective standard." Jones v. Landry, 387 F.2d 102 (5th Cir. 1967). Where the plaintiff makes an honest error in alleging that the amount in controversy exceeds the jurisdictional limits, but discovery demonstrates that the amount is certainly less, the suit will be dismissed for lack of jurisdiction. American Mutual Liability Ins. Co. v. Campbell Lumber Mfg. Corp., 329 F.Supp. 1283 (N.D. Ga. 1971).

The plaintiff must prove that there is in fact a "current violation", within the broad meaning of that phrase suggested by

Pawtuxet Cove and the concurring opinion of Judge Williams in Hamker. Where, at the time suit is filed, there is in fact no such "current violation," then neither injunctive relief nor a civil penalty is or will be appropriate, and jurisdiction does not lie.

CONCLUSION

The broader aspect of this case concerns what the amicus contends is both the illegality and the impropriety of the "vigilante-style" citizen suit litigation currently being conducted under the aegis of jurisdiction over past violations. If such suits are sanctioned by this Court, they will only increase further in numbers, as tens of thousands of permit-holders under three major federal environmental statutes are subject to the same citizen suits provision.

The rule of law which would enable these plaintiff organizations to continue

to pursue their litigation and settlement campaign is one which will apply to all plaintiffs. A citizen suit for even a single minor and technical violation of the Act five years prior to the filing of a Complaint will be made possible by the plaintiffs' statutory reading. Since a DMR admits liability, and since the statute provides a strict liability standard, $25,000 potential penalty, and attorneys fees in any event, there is little if any incentive not to sue for even the most trivial violation. This is certainly not the result that Congress intended.

For the reasons stated above, the amicus respectfully submits that this Court should reverse the decision of the Fourth Circuit below, and hold that the federal courts lack subject matter jurisdiction over citizen suits seeking civil penalties for past violations.

CONNECTICUT BUSINESS AND
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Appendix A

CITIZEN SUIT NOTICES BY YEAR

Year	All Notices	Notices Filed By Major Environmental Groups*
1978	1	Unknown
1979	9	Unknown
1980	6	Unknown
1981	6	Unknown
1982	17	13
1983	110	88
1984	178	121
1985	135	36
1986	205	119
Totals	667	377

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

Appendix B

CITIZEN SUIT NOTICES BY EPA REGION
1982-1986

Region	All Notices	Notices Filed By Major Environmental Groups*
I	109	92
II	109	78
III	135	69
IV	54	11
V	110	71
VI	72	34
VII	3	0
VIII	2	0
IX	28	11
X	23	11
Totals	645	377

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

Appendix C

PAST VIOLATION CLAIMS IN CITIZEN SUIT NOTICES (1982 - 1986)

PER-NOTICE BASIS[1]

	Total Notices	Time Lag[3] < 4 Mos.	%	Time Lag 4 Mos. +	%
1982	13	1	8	12	92
1983	60	10	17	50	83
1984	119	22	18	97	82
1985	48	14	29	34	71
1986	113	25	22	88	78
	353	72	20	281	80

PER-PARAMETER BASIS[2]

	Total Parameters	Time Lag < 4 Mos.	%	Time Lag 4 Mos. +	%
'82-'86	4288	227	5	4061	95

1. "Per-Notice Basis" analyzes each Notice independently, in terms of most recent claim of violation cited in Notice.
2. "Per-Parameter Basis" analyzes each Parameter independently in terms of most recent claim of violation of that Parameter cited in Notice.
3. "Time Lag" is the period of time between the most recent claim of violation and the date of the Notice.

Appendix D

CITIZEN SUIT SETTLEMENTS
1/1/83 - 12/31/86

Connecticut Cases

Notices filed	54	
Notices by CFE/NRDC*	47	
Suits Filed	37	
Suits by CFE/NRDC	37	
Settlements	30	
Contributions to Open Space Institute		$869,500
Payments to CT DEP		67,500
Payment to Middleburg Land Trust (est.)		12,000
Payments to unknown recipients		87,000
Payments to U.S. Treasury		0
Sub-total		1,036,000
Payments to CFE/NRDC for costs/atty. fees		492,036
Total payments		$1,528,036

Other Cases (Non-Connecticut)

Known settlements (31)	
Payments to U.S. Treasury	$723,900
Payments to others**	3,692,050
Sub-total	$4,415,950
Known attorneys fee/ costs payments (16)	720,488
Total known payments	$5,136,438
Total of all known (61) settlements	$6,664,474

* Connecticut Fund for the Environment, and Natural Resources Defense Council.

** Recipients are usually environmental organizations, or in few instances public-sector state or local entities.